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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1947**

# No. 700

F. S. GAMBRELL, ET AL.,

*Appellants,*

*vs.*

CHALK HILL THEATRE COMPANY, LTD., ET AL.

*Appellees.*

APPEAL FROM THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT, STATE OF TEXAS

## STATEMENT AS TO JURISDICTION ON APPEAL

F. S. Gambrell and Jack Gambrell, the above named Appellants, submit this Statement in accordance with Rule 12 of the Rules of this Court, particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review this cause on appeal from the final judgment entered herein by the Court of Civil Appeals for the Third Supreme Judicial District of Texas, sustaining an ordinance of the City of Austin and an Act of the Legislature of the State of Texas as applied to them, challenged as being repugnant to the due process clause of the Fourteenth Amendment to the

Constitution of the United States, as hereinafter more fully pointed out.[1]

## I

### Statutory Provisions Sustaining Jurisdiction

1. This Court has jurisdiction of this appeal under Section 237 of the Judicial Code as amended (U.S.C.A. Title 28, Sec. 344(a)), which provides that,

> "(a) A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had . . . where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error . . ."

The decision complained of here sustains the validity of a State statute and also the validity of a city ordinance. *Jamison* v. *State of Texas* (Tex. 1943), 318 U. S. 413, treats a city ordinance just as though it were a State statute within the meaning of U.S.C.A. Title 28, Section 344a, *supra*.

2. Pursuant to the Act of January 31, 1928 (45 Stat. 54; U.S.C.A. Title 28, Sec. 861(a)), as amended by the Act of April 26, 1928 (45 Stat. 455; U.S.C.A. Title 28, Sec. 861 (b)), the present appeal is brought in lieu of a writ of error.

## II

### Statute of the State, the Validity of Which Is Involved

(a) The Statute of Texas (Ch. 84, p. 257, General Laws, 5th Called Session, 41st Legislature, 1935, being Vernon's

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[1] The opinion of the State court (copied as Appendix "A" hereto) expressly shows that these Federal questions were raised and were duly considered and decided by the court.

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Civil Statutes of Texas, Article 4646(a)), the validity of which is herein involved, as applied to the Appellants under the facts of this case is, in so far as relevant, as follows:

> "No injunction shall be granted to stay or prevent the vacating, abandonment or closing, by the City Council or governing body of any incorporated city of this State, of any street or alley in any such incorporated city of this State, except at the suit of the owner or lessee of real property actually abutting on that part of such street or alley actually vacated, abandoned or closed, and then only in the event that the damages of said owner or lessee shall not have been released or shall not have been ascertained and paid in a condemnation suit by such city."

The ordinance of the City of Austin, the validity of which is herein involved, is, in so far as relevant, as follows:

> "An Ordinance Vacating the Subdivision Known As 'Northfield Annex No. 2' and Also Vacating All Streets, Avenues, Alleys, Utility Easements and Other Public Places In Said Subdivision, and Declaring An Emergency.
>
> "Be It Ordained By the City Council of the City of Austin:
>
> "*Section 1.* The plat of the subdivision known as 'Northfield Annex No. 2,' as recorded in Book 4, at page 135, of the Plat Records, Travis County, Texas, be and the same is hereby vacated so that the same shall hereafter have no force or effect as a subdivision of the property constituting said subdivision, as shown by the Plat.
>
> "*Section 2.* All streets, avenues, alleys, utility easements and other public places within said 'Northfield Annex No. 2' Subdivision are hereby vacated, abandoned and closed."

## III

### Date of Judgment and Date of Presentation of Application for Appeal

1. The judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas sought to be here reviewed was entered on October 8, 1947. Appellants' motion for rehearing was filed within fifteen days, as authorized by Rule 458, Texas Rules of Practice and Procedure in Civil Actions. The motion was entertained and overruled on October 29, 1947. Thereupon, within the time limited by law (Articles 1728 and 1729, Revised Civil Statutes of Texas 1925, and Rule 468, Texas Rules of Practice and Procedure in Civil Actions), Appellants petitioned the Supreme Court of Texas to grant the writ of error and review the case. The petition was refused by the Supreme Court on January 7, 1948.

Appellants thereupon, within fifteen days as is authorized by Rule 515, Texas Rules of Practice and Procedure in Civil Actions, filed their motion for rehearing of the application for writ of error. This motion for rehearing was entertained by the Supreme Court of Texas and was overruled on February 4, 1948; whereupon the judgment of the Court of Civil Appeals here sought to be reviewed became final under the State law.[2]

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[2] When a petition for writ of error is filed, the petition and the original record are forwarded by the Clerk of the Court of Civil Appeals to the Clerk of the Supreme Court. (See Rules 472 and 473, Texas Rules of Practice and Procedure in Civil Actions.) The record is retained in the Supreme Court for fifteen days after the petition is refused awaiting the filing of a motion for rehearing, and then until the court has overruled any such motion that may be filed. It is then returned to the Court of Civil Appeals. (See Rule 484, Texas Rules of Practice and Procedure in Civil Actions.) True Copies of the court rules here referred to are here appended as Appendix "B."

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The Court of Civil Appeals has possession of the record and is the "highest court of the State in which a decision in the suit could be had."

The following are samples of cases brought here from Courts of Civil Appeals in Texas:

*T. & N. O. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111, 113;

*St. Louis S. F. & T. R. Co.* v. *Seale*, 229 U. S. 156;

*S. A. & A. P. R. Co.* v. *Wagner*, 241 U. S. 476;

*Zucht* v. *King*, 260 U. S. 174;

*Lone Star Gas Co.* v. *State of Texas*, 304 U. S. 224.

2. The date on which this Application for Appeal is presented is February 21, 1948.

## IV

**The Nature of the Case and of the Rulings of the State Court Bringing This Case Within the Jurisdiction of This Court.**

Under this heading will also be shown when and how the Federal questions sought to be reviewed were raised; the method of raising them, and the way in which they were passed upon by the State court as required by Amended Rule 12.

### Nature of the Case

In this suit Appellants challenge on grounds arising under the Federal Constitution as construed by the State courts and applied to them, (1) an Act of the Texas Legislature, and (2) an ordinance of the City of Austin, both copied under heading II.

This action was brought by the Appellants F. S. Gambrell and Jack Gambrell against Chalk Hill Theatre Company, Ltd., Walter Staehely and the City of Austin for an

injunction enjoining Staehely from giving effect to and from enforcing the terms of an instrument which he executed February 28, 1946 and filed in the office of the County Clerk of Travis County on March 21, 1946, revoking a subdivision known as Northfield Annex No. 2 previously made by him and recorded on August 6, 1940; and for an injunction enjoining the city from giving effect to and from enforcing the terms of an ordinance adopted by it on February 28, 1946, vacating the subdivision known as Northfield Annex No. 2; and enjoining the company from physically closing any of the streets or alleys within such subdivision or from interfering with Appellants' use thereof.

In the trial court the Appellants urged that the attempted revocation of the subdivision by Staehely on February 28, 1946, the ordinance of the city of February 28, 1946, purporting to vacate the subdivision, and the physical closing of any of the streets or alleys within such subdivision without compensation to Appellants, amounted to taking of their property (their private easement in the streets, alleys, etc.) without due process of law.

The Appellees contended that the City of Austin had exclusive control over the streets and alleys within the city, and the ordinance purporting to vacate and close the streets and alleys was therefore valid. They further contended that Chapter 84, page 257, General Laws, 5th Called Session 41st Legislature, Acts 1930, being Vernon's Civil Statutes of Texas, Article 4646a, in any event prevented the issuance of an injunction as prayed for by Appellants.

In the State courts Appellants urged, first, that the ordinance should be so construed as to close and vacate only the *public easement* and *not* the private easement; and secondly, if said ordinance was not so construed it violates the Fourteenth Amendment to the Constitution of the United States in that it deprives the Appellants of their property (private

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easement in said streets, alleys, etc.) without due process of law, in this,—that it takes their private easement without compensation.

As to Chapter 84, page 257, General Laws aforesaid, in the State courts Appellants urged, first, that the Act should be so construed as to prevent an injunction only in so far as the public easement in the street is concerned; and secondly, if said Act was not so construed it violates the Fourteenth Amendment to the Constitution of the United States in that it deprives the Appellants of their property (their private easement in the streets, alleys, etc.) without due process of law.

The grounds of attack duly pleaded in the court of first instance are that the ordinance and the Act, if construed and applied to prevent them from protecting their private easement by injunction, deprives them of their property without due process of law.

The trial court, the Court of Civil Appeals and the Supreme Court of Texas sustained the Appellees' (defendants') contentions and overruled the contentions of the Appellants (plaintiffs). Judgment in the trial court was against the Appellants, denying the injunction in whole; judgment in the Court of Civil Appeals was an affirmance of the trial court's judgment; and the Supreme Court of Texas by refusing to review the case on writ of error sustained the trial court and the Court of Civil Appeals. The court's opinion was not based upon any non-Federal ground.

### Rulings of the State Court

The court of first instance, being one of the District Courts of Travis County, denied plaintiffs an injunction and thereby upheld as valid (1) the February 28, 1946 instrument revoking the subdivision known as Northfield Annex 2; (2) the February 28, 1946 ordinance of the City of

Austin vacating the subdivision and closing the streets and alleys thereof; and (3) the Act of the company in physically closing the streets. The Appellants had by their original petition filed in the trial court challenged the entire procedure, separately and collectively, as being in violation of the due process clause of the Constitution, in that if given effect the property (private easement) of Appellants would be taken without compensation and without due process of law. The trial court overruled Appellants' contentions and, as above stated, entered judgment for Appellees.

The Court of Civil Appeals, being the intermediate appellate court, affirmed the judgment of the trial court. In so doing the Court of Civil Appeals held that Appellants had acquired vested rights in the streets and alleys in the subdivision from Staehely, their grantor, and that these rights were as to him irrevocable and that his attempted revocation was without legal effect. However, the court held that the city ordinance "accomplished the same purpose as the attempted revocation by Staehely" and was valid.

The Federal question sought to be reviewed was raised in the Court of Civil Appeals by an assignment of error, as well as by the original petition in the trial court. The Court of Civil Appeals held in effect that the city ordinance effectually vacated and closed the streets and alleys in question, and denied Appellants an injunction to prevent such closing, thereby holding that the city could take Appellants' vested property rights (their private easement in the streets and alleys) by the mere enactment of such ordinance and without compensation.

We quote in part from the opinion of the Court of Civil Appeals:

> "There is no doubt but that a valid dedication of the streets shown on the 1940 plat of Northfield Annex

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No. 2 was made by appellee Staehely. Nor is there any doubt but that appellants, by purchasing a lot or lots within the subdivision, and with reference to its map or plat, have acquired vested rights in the streets and alleys shown thereon. City of Corsicana *v.* Anderson, 33 Tex. Civ. App. 596, 78 S. W. 261 writ refused.

"We also have no doubt but that the 1940 dedication by appellee Staehely became irrevocable, in so far as he is concerned, after the conveyance of Lot 15, as above shown. McLennan County *v.* Taylor, Tex Civ. App., 96 S. W. 2d 997, writ dismissed.

"It follows that the attempted revocation of the 1940 dedication by appellee Staehely was without legal effect.

"The ordinance adopted by the City February 28, 1946, vacating the subdivision known as Northfield Annex No. 2, accomplished the same purpose as the attempted revocation by Staehely. • • •

• • • • • • • •

"In this case damages are neither sought nor alleged. Appellant did allege that:

'(a) To close and vacate sale streets will be to deprive these plaintiffs of valuable property rights and thereby constitute a taking of plaintiffs' property without due process of law.

'(b) The revocation of the subdivision by appellee Staehely "has cast upon the title of the property owned by plaintiffs a cloud which is in effect a taking of plaintiffs' property without due process of law."

'(c) Any damages which plaintiffs might be entitled to receive against any one or more of the defendants named herein would be uncertain and indefinite in amount, incapable of definite ascertainment.'

"We have already held the revocation of the subdivision by appellee Steahely to be void.

"Without repeating the undisputed facts as shown by this record, we hold that no 'taking' of appellants'

property under Art. 1, Sec. 17 of our Constitution, Vernon's Ann. St. is shown as there is no physical invasion or appropriation of appellants' property.

• • • • • • •

"We are further of the opinion that Art. 4646a, Vernon's Ann. Civ. St., precludes appellants from obtaining injunctive relief against enforcement of the ordinance or resubdivision of 1946. This Article provides: 'No injunction shall be granted to stay or prevent the vacating, abandonment or closing, by the City Council or governing body of any incorporated city of this State, of any street or alley in any such incorporated city of this State, except at the suit of the owner or lessee of real property actually abutting on that part of such street or alley actually vacated, abandoned or closed, and then only in the event that the damages of said owner or lessee shall not have been released or shall not have been ascertained and paid in a condemnation suit by such city.'

• • • • • • •

"The constitutionality of Art. 4646a was sustained in Kahn *v.* City of Houston, 121 Tex. 293, 48 S. W. 2nd 595."

In other words, the opinion of the Court of Civil Appeals shows that Appellants urged that as applied to them and as construed by the court, the ordinance and Chapter 84, page 257, General Laws aforesaid, were unconstitutional in that action of the Appellees thereunder is in effect the taking of Appellants' property without due process of law.

In their motion for rehearing in the Court of Civil Appeals, which was overruled on October 29, 1947, the Appellants by an assignment of error again urged that the ordinance and the Act of the Legislature as construed and applied against them constituted a taking of their property without due process of law.

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In due time, as permitted by State law, Appellants filed their petition for writ of error asking the Supreme Court of Texas to review the judgment of the Court of Civil Appeals, which petition was refused on January 7, 1948. Thereafter, and within the time permitted by State law, appellants filed their motion for rehearing in the Supreme Court and said motion was overruled on February 4, 1948.

The Appellants assigned as error in the Supreme Court the following grounds:

> "I. Petitioner had, by virtue of his purchase of Lot 15, Block 1, Northfield Annex No. 2 Addition, with specific reference to and reliance upon the deed of dedication and map, a *private easement* over all streets in the Addition. A private easement is an interest in land. Injunction is the proper remedy to protect his interest in land. To deny Petitioner an injunction is to violate Article 1, Sections 17 and 19, Constitution of Texas, and the Fourteenth Amendment to the Constitution of the United States, in that Petitioner is deprived of his property without due process of law. The Court of Civil Appeals erred in failing to so hold, and this Honorable Court erred in denying Petitioners' Application.
>
> "II. Article 4646a V.A.C.S. does not deny Petitioner the right to injunction to protect a private easement. If it is to be so construed, then it is invalid because contrary to Article 1, Sections 17 and 19, Constitution of Texas, and the Fourteenth Amendment to the Constitution of the United States. The Court of Civil Appeals erred in failing to so hold, and this Honorable Court has erred in denying Petitioners' Application for Writ of Error."

By refusing to review the case the Supreme Court of Texas held, as did the Court of Civil Appeals and the trial court, that Appellants could be deprived of an interest in land (a private easement over the streets and alleys) by the

mere enactment of an ordinance by a city and without compensating the Appellants, and that Appellants were not entitled to an injunction to protect their interest in land.

Cases believed to sustain the jurisdiction of the Supreme Court of the United States are: *Miller* v. *Schoene* (Va. 1928), 276 U. S. 272, holding that where a state statute was challenged in state court under the due process clause, the case was properly within the jurisdiction of the Supreme Court of the United States; and *Jamison* v. *State of Texas* (Tex. 1943), 318 U. S. 413, holding that a city ordinance prohibiting distribution of hand-bills on streets was a "statute" within subsection (a) of Section 344a, United States Code.

## V

### The Questions Involved Are Substantial

The decisions in the instant case of the State courts are in conflict with previous decisions of the Supreme Court of the United States. One such case is *Panhandle Eastern Pipeline Co.* v. *State Highway Commission of Kansas*, 294 U. S. 613, wherein this court considered an order of the State Highway Commission of Kansas requiring the company to make specified changes in its transmission lines located on its own rights-of-way to determine whether or not such an order was in violation of the Fourteenth Amendment to the Constitution of the United States. We quote from the opinion:

> "If carried into effect, the challenged order of the commission would result in taking private property for public use. State of Washington ex rel. Oregon R. & Nav. Co. *v.* Fairchild, 224 U. S. 510, 523, 524, 32 S. Ct. 535, 56 L. Ed. 863; Southern Ry. Co. *v.* Virginia, 290 U. S. 190, 194, 54 S. Ct. 148, 78 L. Ed. 260. A private right of way is an easement and is land. United States *v.* Welch, 217 U. S. 333, 339, 30 S. Ct.

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527, 54 L. Ed. 787, 28 L.R.A. (N.S.) 385, 19 Ann. Cas. 680. No compensation was provided for; none was intended to be made. Ordinarily, at least, such taking is inhibited by the Fourteenth Amendment. Chicago, B. & Q. Ry. Co. *v.* Chicago, 166 U. S. 226, 241, 17 S. Ct. 581, 41 L. Ed. 979; Chicago B. & Q. Com'rs, 200 U. S. 561, 593, 26 S. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175; McCoy *v.* Union Elevated Ry. Co., 247 U. S. 354, 363, 38 S. Ct. 504, 62 L. Ed. 1156; Chicago, B. & Q. R. Co. *v.* Pub. Util. Comm., 69 Colo. 275, 279, 193 P. 726. See Lewis Eminent Domain (3rd Ed.) sec. 223.

"A claim that action is being taken under the police power of the state cannot justify disregard of constitutional inhibitions. Schlesinger *v.* Wisconsin, 270 U. S. 230, 240, 46 S. Ct. 260, 70 L. Ed. 557, 43 A. L. R. 1224; Georgia Power Co. *v.* Decatur, 281 U. S. 505, 508, 50 S. Ct. 369, 74 L. Ed. 999; Southern Railway Co. *v.* Virginia, supra, page 196 of 290 U. S., 54 S. Ct. 148."

The foregoing was a case where the Highway Commission had secured a right of way for the purpose of relocating a state highway on land in which the pipe line company had theretofore secured an easement for its pipelines.

It is our view that just as Mr. Justice McReynolds said in that case, we in our case have "a private right of way (which) is an easement and is land." Nor do we believe that this Honorable Court will sanction a decision by the Court of Civil Appeals in the instant case which disregards constitutional inhibitions under the guise that the city is acting under the police power. We quote further from the opinion:

"The police power of a state, while not susceptible of definition with circumstantial precision, must be exercised within a limited ambit and is subordinate to constitutional limitations. It springs from the obligation of the state to protect its citizens and provide for the safety and good order of society. Under it

there is no unrestricted authority to accomplish whatever the public may presently desire. It is the governmental power of self-protection and permits reasonable regulation of rights and property in particulars essential to the preservation of the community from injury."

• • • • • • •

"As construed below, the challenged statute authorizes an arbitrary and unreasonable order by the state highway commission, whose enforcement would deprive appellant of rights guaranteed by the Federal Constitution."

As heretofore pointed out, the Court of Civil Appeals in the instant case held that Appellants had "acquired vested rights in the streets and alleys" in the subdivision; that such rights were "irrevocable" and that "the attempted revocation of the 1940 dedication by Appellee Staehely was without legal effect."

As we shall hereafter show, the holding of the Court of Civil Appeals down to this point was in keeping not only with the decisions of the Supreme Court of the United States but with the decisions of the Supreme Court of Texas. But after making the above holding, the Court of Civil Appeals held that "the ordinance adopted by the city February 28, 1946 vacating the subdivision known as Northfield Annex 2, accomplished the same purpose as the attempted revocation by Staehely"; and further held that such ordinance was valid. It is this last holding which is in direct and irreconcilable conflict with the decision of the Supreme Court of the United States from which we heretofore quoted.

That the questions involved are substantial is further shown by the fact that the instant case is in conflict with previous decisions of the Supreme Court of Texas. These we shall discuss briefly.

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When Respondent Staehely sold Lot 15, Block 1, Northfield Annex No. 2 to Petitioner Gambrell, by the deed of conveyance Gambrell took title to the lot, and in addition thereto to the middle of the street upon which the lot abuts, subject to the right of the public to the use thereof. *Texas Bitulithic Co.* v. *Warwick* (Comm. App.) 293 S. W. 160.

In addition to the foregoing, by such deed Petitioner acquired "an easement in the land designated as a street" with "the right to have such street or alley kept open, *whether the public has or not accepted the dedication by some acts of user.*" *Wolf* v. *Brass,* 72 Tex. 133, 12 S. W. 159.

An easement is "an interest in land." *Settegast* v. *Foley Bros. Dry Goods Co.,* (Comm. App.) 270 S. W. 1014, 1016.

An easement "always implies an interest in land in or over which it is to be enjoyed." *Coughran* v. *Nunez,* (Comm. App.) 127 S. W. (2d) 885, 888.

"Interference with such easement will be protected by injunction." *Standard Oil & Gas Co.* v. *Wimberly,* 181 S. W. (2d) 944.

In the recent case of *Latimer* v. *Hess,* 183 S. W. (2d) 996, the court held that "an easement is an interest in land," and that a mandatory injunction was the proper remedy for one having such an easement to require the removal of obstructions from an alley.

"An easement in land is an interest in land—an incorporeal hereditament." *Clements et al* v. *Taylor et al,* 184 S. W. (2d) 485.

In the case of *Gillett* v. *Van Horne* by the El Paso Court of Civil Appeals, 36 S. W. (2d) 305, writ dismissed, the court, after first holding that trespass to try title was not

the remedy to establish or prevent the obstruction of an easement, said:

> "• • • but it is well settled that due enjoyment of an easement will be protected by injunction against encroachments or obstructions."

In *Texas & P. Ry. Co.* v. *City of El Paso* (Sup.) 85 S. W. (2d) 245, 249, Associate Justice Sharp in a case involving a question of taxation, said:

> "An easement is essentially an interest in land."

Justice Funderburk, in *Burgess* v. *City and County of Dallas Levee Imp. Dist.*, 155 S. W. (2d) 402, 405, writ refused for want of merit, said:

> "An easement in land is an interest in land and therefore is land."

Stated in another way, the courts have held that "an easement is defined as 'a right which one proprietor has to some profit, benefit, or lawful use out of or over the estate of another proprietor.'" *Henslee* v. *Boyd*, 107 S. W. 128, 129; *Callan* v. *Walters*, 190 S. W. 829, 830; *West* v. *Giesen*, 242 S. W. 312, 319; *Magnolia Petroleum Co.* v. *Caswell*, 1 S. W. (2d) 597, 600.

In *Oswald* v. *Grenet*, 22 Tex. 94, the action was for injunction. The Supreme Court vouchsafed this remedy, saying:

> "• • • and the purchasers of lots have a right to have the streets thrown open forever, and this principle is not limited in its application to the single street on which the lots of the purchaser are situated."

The Supreme Court of Texas refused to review the case of *Eidelbach* v. *Davis*, 99 S. W. (2d) 1067. In that case the Court of Civil Appeals said:

> "It is a well settled rule in Texas that the two classes of easements, the one inuring to the public in general by the filing of the plat and dedication, and

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the other inuring to lot purchasers by reason of their contract, are separate and distinct rights which may coexist in contemporaneous and harmonious operation and one may be destroyed without necessary impairment of the other. *That is to say, the proper public authority may vacate and close or relinquish the public easement without impairing any private or contractual rights which may exist in the easements affected.*" (P. 1072)

In *Amerman* v. *Missouri, K. & T. Ry. Co. of Texas,* 182 S. W. 54 (writ refused by Supreme Court), the Court of Civil Appeals in its opinion said:

> "The abandonment by the city of any rights it may have had in said street in no way affected the existence of the street. The rights of all persons owning property abutting thereon or adjacent thereto, *and who held under conveyances referring to and calling for said street to keep the street open was not dependent upon whether the public accepted the dedication or abandoned its rights thereto.* Oswald *v.* Grenet, 22 Tex. 94; Wolf *v.* Brass, 72 Tex. 133, 12 S. W. 159."

Many other cases so holding could be cited and quoted from but they would be merely cumulative of the decisions we have cited and quoted from above.

## VI

### Opinion Appended

Copy of the opinion of the Court of Civil Appeals (unofficially reported 205 S. W. (2d) 126) is attached as Appendix "A."

Dated this 20 day of February, 1948.

F. S. Gambrell,
Jack Gambrell,
By Everett L. Looney,
*712 Brown Building,*
*Austin, Texas,*
*Their Attorney.*

## APPENDIX "A"

No. 9647

F. S. GAMBRELL ET AL., *Appellants,*

*vs.*

CHALK HILL THEATRE COMPANY, LTD., ET AL., *Appellees*

From the District Court of Travis County

F. S. Gambrell and Jack Gambrell, appellants, sued Chalk Hill Theatre Company, Ltd., hereinafter called "Company," Walter Staehely and the City of Austin, hereinafter called "City", appellees, for an injunction enjoining Staehely from giving effect to and from enforcing the terms of an instrument which he executed February 28, 1946, and filed in the office of the County Clerk of Travis County, March 21, 1946, revoking a subdivision, known as Northfield Annex No. 2, previously made by him and recorded on August 6, 1940; and for an injunction enjoining the City from giving effect to and from enforcing the terms of an ordinance adopted by it February 28, 1946, vacating the subdivision known as "Northfield Annex No. 2"; and enjoining the Company from physically closing any of the streets or alleys within such subdivision, or from interfering with appellants' use thereof.

The recovery of damages was not sought.

Separate so-called pleas in abatement were filed by appellees, all of similar import, alleging, under oath, that appellants were not the owners or lessees of any real property actually abutting on any part of any street vacated, abandoned or closed by Staehely or the City, and that an action for injunction would not lie, appellants being relegated to an action at law for damages.

Upon hearing the court sustained these pleas and, appellants declining to amend, dismissed the suit; hence this appeal.

The facts are undisputed except as to an allegation on the part of appellants that the ordinance adopted by the City was enacted for the sole and only purpose of accommo-

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dating the Company which desired to construct a drive-in theatre which would encroach upon the streets and alleys which were closed and abandoned by such ordinance, and that such ordinance did not, as recited in it, serve to promote the health, safety and general welfare of the public, and that all appellees had actual knowledge of these facts.

On August 6, 1940, appellee Staehely, the owner of certain property in the northern portion of Austin, Texas, filed for record in the office of the County Clerk of Travis County, Texas, a plat styled "Northfield Annex Number Two." This dedication and plat was approved and accepted by the City Planning Board and the City Engineer on August 2, 1940, as required by Art. 974a, RCS. There appeared on this plat of Northfield Annex No. 2 a dedication by Staehely which reads, in part, as follows:

> "I do hereby dedicate and set apart for public use as streets, the streets shown thereon, as far as my interest may appear."

Thereafter, on January 22, 1946, appellant F. S. Gambrell purchased Lot No. 15 in Block 1 of Northfield Annex No. 2, and secured from Staehely a general warranty deed to this property. The purchase of this lot was made with specific reference to the plat and dedication filed in the office of the County Clerk of Travis County, Texas.

On February 15, 1946, appellant F. S. Gambrell contracted with appellee Staehely for the purchase of Lot 14, Block 1, Northfield Annex No. 2.

Thereafter, on February 28, 1946, appellee Staehely executed and filed for record in the office of the County Clerk of Travis County, Texas, an instrument whereby he sought to vacate and annul the streets, alleys, avenue, utility easements, and other public places within the Northfield Annex No. 2 Addition. On the same day the City Council of the City of Austin passed an ordinance whereby it purported to vacate and close all streets, avenues, alleys, utility easements and other public places within the Northfield Annex No. 2 Addition.

On March 6, 1946, appellee Staehely, representing himself as sole owner of the subdivision, filed a plat of record in

the office of the County Clerk of Travis County, Texas, styled "Northfield Annex Number Two." This new plat showed a changed course for Guadalupe Street with reference to its prior location on the first plat of record, and showed a complete abandonment and closing of portions of 55th, 55½ and 56th Streets in the Northfield Annex No. 2 Subdivision.

Appellants' Lots 14 and 15 front on Nelray Blvd. The east-west streets in this subdivision begin with Nelray Blvd. as the most southerly, 55th, then 55½ and 56th as the most northerly east-west street. Appellants' lots abut only on Nelray Blvd., which is not in any way altered by the resubdivision. 55th Street is shortened by 133.31 feet, 55½ Street by 230.18 feet, 56th Street by 230.04 feet. This is due to the easterly swing of Guadalupe Street as shown on the March 1946 plat of the resubdivision. On the original 1940 plat Guadalupe Street was straight, without curving to the east and the streets mentioned were hence of greater length.

There is no doubt but that a valid dedication of the streets shown on the 1940 plat of Northfield Annex No. 2 was made by appellee Staehely. Nor is there any doubt but that appellants, by purchasing a lot or lots within the subdivision, and with reference to its map or plat, have acquired vested rights in the streets and alleys shown thereon. City of Corsicana *v.* Anderson, 78 S. W. 261 (Ct. Civ. App. Writ Ref.).

We also have no doubt but that the 1940 dedication by appellee Staehely became irrevocable, insofar as he is concerned, after the conveyance of Lot 15, as above shown. McLennan Co. *v.* Taylor, 96 S. W. 2d 997 (Ct. Civ. App. Writ Dis.).

It follows that the attempted revocation of the 1940 dedication by appellee Staehely was without legal effect.

The ordinance adopted by the City February 28, 1946, vacating the subdivision known as Northfield Annex No. 2, accomplished the same purpose as the attempted revocation by Staehely. The ordinance recites, in the emergency clause, that the owners of Northfield Annex No. 2 desired

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to resubdivide the land in this addition in order to promote the health, safety and general welfare of the community.

Appellants deny the truth of the recitation in the emergency clause and say that the closing of such streets and alleys was part of a scheme by Staehely and the Company to make use of said subdivision as one tract, without streets and alleys, for their private gain and the private purpose of constructing an outdoor theatre thereon.

The issue, thus raised, has not been disposed of, and, if material, will, of necessity, require remand of this cause.

The City of Austin, as a Home Rule City, has plenary powers over its streets. Secs. 16, 17, 18, Art. 1175 VACS, Art. XIII, Sec. 1(i) City Charter of Austin; City of Dallas *v.* Ingram, 284 S. W. 345 (Ct. Civ. App. Writ Ref.); Duvall *v.* City of Dallas, 27 S. W. 2d 1105 (Ct. Civ. App. Writ Ref.).

Having this power, it is, nevertheless, well settled that a city may not, validly, abandon or close a street or alley in order to confer a private benefit or convenience. 39 Tex. Jur., pp. 534 and 535.

So, for the purpose of this opinion, we assume the truth of appellants' allegations that the ordinance was passed for a private and not a public purpose, and that the ordinance is void.

Bearing in mind that damages are not sought, we must determine appellants' right to injunctive relief.

In Malott *v.* City of Brownsville, 298 S. W. 540 (Com. App., same case, 292 S. W. 606, 300 S. W. 29, and 4 S. W. 2d 965, appellant, as an abutting property owner and taxpayer, sued appellees to restrain the enforcement of an ordinance and to annul the same, which undertook to grant R. B. Creager, appellee, a franchise for the period of 50 years to occupy certain portions of Fourteenth Street and of Levee Street, in the City of Brownsville, and to construct, maintain, and operate on said parts of said streets piers, abutments, and other works necessary for the construction of the bridge and the landings and approaches thereto, and to construct and maintain thereon telegraph and telephone lines and toll houses and other structures necessary in the operation of said bridge, and restrain the defendants from closing or obstructing said portions of said streets.

The ordinance was alleged to be void for many reasons, including:

"* * * that it was further void because it was an attempt to take appellant's property for private use and purposes, without condemnation or paying adequate compensation therefor."

The Commission of Appeals held:

"It is unnecessary for us to pass upon the interesting question of the validity of the ordinance under which defendant in error Creager proposes to erect the structures complained of. If it be true, as found by the Court of Civil Appeals, that plaintiff in error has shown no probable injury from the threatened structures, then clearly he is in no event entitled to an injunction. The law is very clear on this point. An injunction will never be granted unless it appears that injury will otherwise result to the applicant. Chisholm *v.* Adams, 71 Texas 678, 10 S. W. 336. So that, if it be conceded the ordinance is void, nevertheless plaintiff in error must go further and show that he is threatened with an irreparable injury by its attempted enforcement before he can possibly be entitled to the relief sought. Pac. Express Co. *v.* Selbert, 142 U. S. 339, 12 S. Ct. 250, 35 L. Ed. 1035.

"In Boise, etc., Co. *v.* Boise City, 213 U. S. 276, 29 S. Ct. 426, 53 L. Ed. 796, the object of the bill was to obtain an injunction against the enforcement of an ordinance of the city. The Supreme Court, in denying the relief sought, said:

" 'It is safe to say that no case can be found where this court has deliberately approved the issuance of an injunction against the enforcement of an ordinance resting on state authority, merely because it was illegal or unconstitutional, unless further circumstances were shown which brought the case within some clear ground of equity jurisdiction.'

"Authorities to this effect abound wherever the principles of equity are administered. Such courts will never do a useless thing, and the excuse for resorting

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to the principles of equity at all is to supply a remedy for the prevention of an injury or wrong for which the law affords no adequate remedy.

"To warrant a recovery in a case like this, it must appear that the complainant has suffered, or will suffer, some special damage. The fact that the ordinance is void, if it is void, is not sufficient ground for enjoining its enforcement. Other circumstances bringing the case under some recognized head of equity jurisdiction must be shown. 32 C. J., p. 265 Sec. 415."

Under this statement of the law, the court in the above case, held the proof of injury insufficient to warrant the issuance of an injunction.

In this case damages are neither sought nor alleged. Appellant did allege that:

(a) "To close and vacate sale streets will be to deprive these plaintiffs of valuable property rights and thereby constitute a taking of plaintiffs' property without due process of law."

(b) The revocation of the subdivision by appellee Staehely "has cast upon the title of the property owned by plaintiffs a cloud which is in effect a taking of plaintiffs' property without due process of law."

(c) "Any damages which plaintiffs might be entitled to receive against any one or more of the defendants named herein would be uncertain and indefinite in amount, incapable of definite ascertainment * * *."

We have already held the revocation of the subdivision by appellee Staehely to be void.

Without repeating the undisputed facts as shown by this record, we hold that no "taking" of appellants' property, under Art. 1, Sec. 17, of our Constitution, is shown as there is no physical invasion or appropriation of appellants' property. Duvall *v.* City of Dallas, 27 S. W. 2d 1105 (Ct. Civ. App. Writ Ref.); Johnson *v.* Lancaster, 266 S. W. 565 (Ct. Civ. App.); Kahn *v.* City of Houston, 48 S. W. 2d 595 (Com. of App.).

Not only do appellants fail to allege any damage, general or special, they expressly decline to do so because the damages would be "incapable of definite ascertainment." It follows that the petition for injunction is not aided by the allegation that the ordinance is invalid.

We are further of the opinion that Art. 4646a, VACS, precludes appellants from obtaining injunctive relief against enforcement of the ordinance or resubdivision of 1946. This Article provides:

> "No injunction shall be granted to stay or prevent the vacating, abandonment or closing, by the City Council or governing body of any incorporated city of this State, of any street or alley in any such incorporated city of this State, except at the suit of the owner or lessee of real property actually abutting on that part of such street or alley actually vacated, abandoned or closed, and then only in the event that the damages of said owner or lessee shall not have been released or shall not have been ascertained and paid in a condemnation suit by such city."

Standing alone, the ordinance passed by the City vacating the subdivision of Northfield Annex No. 2, would close Nelray Blvd., the street on which appellants' property abuts, since it closes all streets in the Annex. This ordinance, however, should be read and construed with the resubdivision of this Annex made by Staehely on March 6, 1946, for the reason that the ordinance of the City of February 28, 1946, refers to and recites the fact that it was adopted in order that such resubdivision be made, and the plat of this new or resubdivision shows to have been expressly approved by the City Engineer and the City Plan Commission of Austin.

Under this view, appellants' property does not abut upon any street vacated, abandoned or closed by the City.

The constitutionality of Art. 4646a was sustained in Kahn *v.* City of Houston, 48 S. W. 2d 595 (Com. App.).

In the emergency clause, appended to the above statute, the legislature took note of the uncertainty created by court decisions in this class of suits. The court in the Kahn case referred to Bowers *v.* City of Taylor, 24 S. W. 2d 816 (Com.

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App.), where injunctive relief was permitted under a state of facts somewhat similar to those presented in the Kahn case, which were there held insufficient to authorize injunctive relief.

It is thus apparent that Art. 4646a has brought about a change in the law as announced in decisions prior to the enactment of this statute.

We, therefore, deem it inappropriate to consume time and space in analyzing all of the decisions cited by the parties which were rendered before the passage of Art. 4646a.

Art. 4646a was first cited by our courts in Sigel *v.* Buccaneer Hotel Co., 40 S. W. 2d 168 (Ct. Civ. App. Writ. Ref.). Appellant in that case was an abutting owner. He sought a mandatory injunction against the Hotel and the City of Galveston, alleging the unlawful obstruction and closing of a street. In holding that the injunction was properly denied by the court, after stating that appellant must show special damage not suffered by the general public, made the following reference to Art. 4646a:

> "In addition to this, the Legislature of this state has limited the right of citizens to maintain a suit of this kind to 'the owner or lessee of real property actually abutting on that part of such street or alley actually vacated, abandoned or closed.' Acts 41st Legislature (Fifth Called Session), Chapter 84, page 257 (Vernon's Ann. Civ. St., Art. 4646a).
>
> "Whether or not this statute applies to this case in which the act complained of occurred prior to the enactment of the statute, it is an emphatic endorsement by the Legislature of the rule of decision above mentioned."

This Article was next held valid in the Kahn case, supra. In this case the injunction was sought not only against the City of Houston but also against two railroad companies to restrain them from closing and appropriating certain streets. Injunction was denied.

Art. 4646a was next cited in Hartwell Iron Works *v.* M. K. & T. Railway, 56 S. W. 2d 922 (Ct. Civ. App.). Injunction

against closing street was denied, the court relying, in part, upon the decision in the Kahn case and this Article. It is noteworthy that only private concerns were parties to this suit.

The last case citing Art. 4646a is Roberts *v.* Shell Pipe Line Corp., 175 S. W. 2d 106 (Ct. Civ. App.). An ordinance passed by the City Council of Colorado City closed certain streets. A mandatory injunction was sought to compel the pipe line company to remove certain fences built across this street. The injunction was denied under the authority of Art. 4646a. The City of Colorado was not a party to this suit.

These cases demonstrate that the denial of injunctive relief under this statute is not limited to the City, as appellants contend, but extends as well to private persons who proceed under and by virtue of the ordinance closing or vacating streets. Very little would have been accomplished by the Legislature if the statute denied such relief against the City alone. The evil to be remedied would still exist. The street, closed by ordinance, would be open to all but the City. The language of this statute is not susceptibel of this construction.

The following cases, decided after the enactment of Art. 4646a, are cited by appellants in support of their claim to injunctive relief:

Griffith et al *v.* Allison et al., 60 S.W. 2d 899, which was reversed and rendered by the Supreme Court, 96 S.W. 2d 74.

Miller et al. *v.* Dallas County et al., 71 S.W. 2d 377 (Ct. Civ. App. Writ Ref.).

Duggan *v.* Buckner et al., 155 S.W. 2d 661 (Ct. Civ. App. Writ Ref. W.O.M.).

Eidelbach et al. *v.* Davis et al., 99 S.W. 2d 1067 (Ct. Civ. App. Writ. Dis.).

These cases are distinguishable on many grounds but it is sufficient to say that in none of these cases was Art. 4646a relied upon or cited by the court and that in none of these cases was a city ordinance closing a street involved, except that in Miller *v.* Dallas County the City of Dallas executed an acquittance of its rights. The land and streets lay outside the City of Dallas and the court held that Dallas

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County alone was authorized to assert jurisdiction for highway purposes.

An injunction against Staehely enjoining acts under his revocation would be useless since the same acts could be lawfully performed under the City ordinance and the resubdivision. Courts of equity do not issue writs of injunction under such circumstances.

Appellants have shown no right to the relief sought and, appellants declining to amend, the trial court properly dismissed their suit.

The judgment of the trial court is affirmed.

(S.) R. G. HUGHES,
*Associate Justice.*

Affirmed.

Filed: October 8, 1947.

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## APPENDIX "B"

### Court Rules

*Texas Rules of Practice and Procedure in Civil Actions*

*Rule 458. Motion for Rehearing*—Any party desiring a rehearing of any matter determined by any Court of Civil Appeals may, within fifteen days after the date of rendition of the judgment or decision of the court, or the filing of the findings of fact and conclusions of law, whether such date be in the same or a succeeding term of said court, file with the clerk of said court his motion in writing for a rehearing thereof, in which the assignments of error relied upon for the rehearing shall be distinctly specified, and the name and residence of the counsel of the opposing party, if known, and if not known, then the name and residence of the opposing party as shown in the record. The party filing such motion shall deliver or mail to each opposing party, or his attorney of record, a true copy of such motion, and shall note on the motion so filed with the clerk that such copies have been so furnished. Upon his failure to do so he shall accompany his motion with, or furnish to the clerk on

his request, a sufficient number of duplicates or copies thereof for the clerk to use in complying with the provisions of Rule 460. Failure to supply such copies on request of the clerk may result in a dismissal of the motion.

*Rule 468. Filing of Application for Writ of Error.*—The application shall be filed with the clerk of the Court of Civil Appeals within thirty days after the overruling of the motion for rehearing, provided, when the thirtieth day falls on Sunday or a legal holiday the petition may be filed on the next day following which is neither a Sunday nor a legal holiday.

*Rule 472. Forwarded to Supreme Court.*—When an application for a writ of error to the Supreme Court is filed with the clerk of a Court of Civil Appeals, he shall note upon his record the filing of said petition, and promptly forward the same to the clerk of the Supreme Court with the original record in the case and the opinion of the Court of Civil Appeals, the motion filed therein, certified copies of the judgment and orders of the Court of Civil Appeals, and a copy of the appeal or the supersedeas bond of the appellant.

*Rule 473. Petition with Record.*—The petition with the original record in the case, and the opinions of the Court of Civil Appeals, and the motion filed therein, and certified copies of the judgments and orders of the Court of Civil Appeals and copy of the appeal or supersedeas bond shall be filed with the Supreme Court. The party applying for the writ of error shall deposit with the clerk of the Court of Civil Appeals a sum sufficient to pay the expressage or carriage of the record to and from the clerk of the Supreme Court, which sum shall be charged as costs of suit.

*Rule 484. Where Application Dismissed or Refused.*—When the application shall have been filed for a period of ten days, if the court determines to refuse or dismiss the same, whether the respondent has answered or not, the clerk of the court will retain the application, together with the transcript and accompanying papers, for fifteen days from the date of rendition of the judgment refusing or dismissing the writ. At the end of that time, if no motion for rehearing

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has been filed, or upon the overruling or dismissal of such motion, in case one has been filed, the clerk of the Supreme Court shall transmit to the Court of Civil Appeals to which the writ of error is sought a certified copy of the orders denying or dismissing such application and of the order overruling the motion for a rehearing thereof, and shall return the papers which belong to that court to the clerk thereof, but shall retain the application for writ of error.

*Rule 515. Motion for Rehearing.*—A motion for rehearing may be filed with the clerk of the court within fifteen days after the date of rendition of the judgment or decision of the court or the order refusing or dismissing an application for writ of error, whether such date be in the same or a succeeding term of such court, and not later; provided, however, that the court in cases of emergency where the ends of justice require it, may deny the right to file such motion. The grounds relied upon for the rehearing shall be distinctly specified in the motion. The motion shall give the name and residence of the counsel of the opposing party if known, and if not known, the name and residence as shown in the record. The party filing such motion shall deliver or mail to each opposing party, or his attorney of record, a true copy of such motion, and shall note on the motion so filed with the clerk that such copies have been so furnished. Upon his failure to do so, he shall accompany his motion with or furnish to clerk on his request a sufficient number of duplicates or copies thereof for the clerk to use in complying with the provisions of Rule 516. Failure to supply such copies on request of the clerk may result in dismissal of the motion.